No. 20554

United States
COURT OF APPEALS
for the Ninth Circuit

JOEL C. HERTSCHE, JR., Executor of the Estate of Joel C. Hertsche, Deceased, and JOEL C. HERTSCHE, JR., Transferee of the assets of the Estate of Joel C. Hertsche, Deceased,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR THE APPELLANTS

On Appeal From the Judgment of the United States District Court for the District of Oregon

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ARGUMENT

I

Introduction

Section 2032 of the Internal Revenue Code of 1954 sets forth in clear and concise terms various rules regarding the elective alternate valuation of a decedent's gross estate. This statutory provision plainly states that prop-

erty distributed by an estate within one year of the decedent's death is to be valued as of the date of distribution. Both parties are in agreement that the stock in question was distributed on October 25, 1960 (R. 3; Gvt. Br. 5). It was correctly valued on that date for estate tax purposes by the Appellant-executor in accordance with the governing statute.

Although neither the Appellant-executor nor the government had any apparent difficulty in determining the distribution date, the government asserts that the statute should be ignored because its use of the term "distributed" is ambiguous (Gvt. Br. 10-13). For this reason, it contends that its own regulation, Treasury Regulation 20.2032-1(c)(2), should be followed rather than the statute. Pursuant to its regulation, the government then concludes that the proper date for valuation is not the date of distributon, but the date distribution was authorized by the probate court.

As outlined in our opening brief, our answer to the government's argument is two-fold. First, the statute is not ambiguous and needs no interpretation by regulation. The term "distribution" is used many times throughout the Internal Revenue Code without difficulty and without need for elaborate definition. Second, even conceding the government's view that the statute is ambiguous, the regulation relied upon by the government exceeds the authority granted to the Treasury to promulgate needful interpretative regulations.

II

The Term "Distribution" As Used in Section 2032 of the Internal Revenue Code of 1954 is not Ambiguous.

As we have noted, the term "distribution" is used in numerous places and in various contexts throughout the tax law. It is always given its commonly understood meaning. This is not disputed by the government. Instead, the government contends that the word is ambiguous only as it is used in Section 2032 (Gvt. Br. 10). To support its contention, the government raises several points of state law dealing with the administration of estates in an attempt to demonstrate the importance of the order of distribution (Gvt. Br. 11-13).

Not only is the government incorrect in most of its statements regarding state law, as we shall see, but, more importantly, such references are simply irrelevant. While we do not deny the importance of orders authorizing distribution as a matter of probate law, this fact adds nothing to the question of whether or not the word "distribution", as used in the statute, is ambiguous. By its argument, the government is apparently attempting to establish the proposition that the entry of the order authorizing distribution is tantamount to actual distribution, or *is* distribution itself, at least within the intent of Congress when it enacted Section 2032. From this reasoning, the conclusion is reached that since one of several possible events can be construed as actual distribution, the word is ambiguous.

The government's major premise is false. Quite clearly, the authorization to distribute is not distribution it-

self, just as an order authorizing the sale of property from an estate is not an actual sale.[1] As to whether Congress intended that the order authorizing distribution be deemed actual distribution within the meaning of the statute, the government provides its own answer in footnote 5 on page 17 of its brief.

In its discussion of state law, the government asserts that the order of distribution establishes the rights of the persons who are to receive the property or vests title in them, and further asserts that a beneficiary's interest in an estate is subject to garnishment after the entry of an order of distribution (Gvt. Br. 12). While we do not believe these points are material to the issues in this case, we feel compelled to disclose their inaccuracy.

In respect to the passage of title, it has long been the law in Oregon that fee title to ownership of the real property of a decedent passes immediately upon his death to his heirs or devisees, subject only to the payment of the debts of the deceased and the right of the personal representative to possession for the purposes of administration. *D'Arcy* v. *Snell,* 162 Or. 351, 364 (1939); *Blake* v. *Blake,* 147 Or. 43, 49 (1934). Title to the personal property of a decedent vests upon death in the executor or personal representative of his estate, in trust, however, with full equitable title vesting immediately in the heirs or distributees. In *Re McLeod's Estate,* 159 Or. 687, 696 (1938).

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[1] Treasury Regulation 20.2032-1(c)(2) recognizes this difference in respect to sales.

As to garnishment, it is clear that under Ore. Rev. Stat. 29.175, the interest of any person in personal property belonging to the estate of a decedent may be subject to garnishment at any time during the administration of an estate and not merely after the entry of an order of distribution. That is the very purpose of the statute. Under prior law, garnishment could be made only after the entry of an order of distribution. *Harrington* v. *LeRocque,* 13 Or. 344 (1886). The above statute was passed in 1931 to correct this situation and overrule cases such as *Harrington.*[2] Thus, the date distribution is ordered has not been material on the question of garnishment for many years. Jaureguy and Love, Oregon Probate Law and Practice, § 831 (1958).

Based solely upon its erroneous analysis of state probate law, the government concludes that the term "distributed", as used in Section 2032, is ambiguous. It then states (Gvt. Br. 13) that the "need for an interpretative regulation . . . is manifest." We submit that the government has failed to show any reason, let alone a good reason, why we should not be entitled to rely upon the alternate valuation statute as written in determining the estate tax value of the disputed stock.

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[2] The government erroneously states (Gvt. Br. 12) that *Harrington* v. *LaRocque, supra,* is still the law, having been codified by Ore. Rev. Stat. 29.175.

III

Treasury Regulation 20.2032-1(c)(2) Improperly Extends the Statute and Should Be Disregarded.

Predictably, the government's case is built on the following steps: the statute, being ambiguous, needs a regulation to interpret it; the regulation in question serves this function and was issued under authority granted to the Treasury Department; it should not be set aside except for weighty reasons.

As we have shown, the statute is not ambiguous and can be easily applied without the aid of the regulation. Moreover, the regulation in dispute purports to do far more than merely interpret the word "distribution." Rather than simply define what is meant by distribution, it provides that three possible events, only one of which is really distribution, shall be *considered* synonymous with distribution. Thus, the regulation does not merely interpret the statute, it establishes its own rules.

On pages 14-15 of the government's brief, numerous authorities are cited which contain certain well-worn theories concerning the legal aspect of regulations issued by the Treasury Department. They were discussed in our opening brief (Br. 20-22), and require no further comment here.

On pages 15-17 of its brief, the government contends that its regulation is in harmony with the statute it purports to interpret. One of the reasons given by the government to support this assertion is that without the regulation doubt and uncertainty would exist as to when distribution occurred. This is without merit, as dis-

closed by the regulation itself. When the statute was enacted employing the word "distribution" alone, certainly no one could deny that this meant actual distribution. The regulation, however, adopts any one of three possible events as within the meaning of the word "distribution". We submit that the regulation itself builds in the doubt and uncertainty complained of by the government.

Moreover, it should be pointed out that one of the three events the regulation considers as distribution, in order to clear up the supposed doubt and uncertainty, is actual distribution. As noted, this is the event that is supposedly doubtful and uncertain according to the government. Thus, the government by its regulation is attempting, in part, to define a word with the same word.

The government further states (Gvt. Br. 16) that if distribution means physical delivery only, then an executrix would be unable to control the estate in the event delivery cannot be made, such as through the unwillingness of a beneficiary to accept his inheritance. This argument is meaningless, because an estate can always be distributed. Ore. Rev. Stat. 117.310(2) provides a remedy in the event a beneficiary refuses to apply for his distributive share of an estate by directing it to be paid to the County Treasurer and, eventually, to the Oregon State Land Board.

On page 17 of its brief, the government argues that the regulation in question is not one that will always benefit the government because property may go up in value between the order of distribution and the actual

delivery. This is true. However, this did not occur with respect to the Appellants in this case, and therefore, is of no consolation to them. They simply believe that they are entitled to have their case determined according to the statute.

On pages 18-19 of its brief, the government points out that Section 2032 does not deal with the incidence of taxation but merely with the time at which valuation is to take place. For this reason, it states that actual receipt or control of the property is not the important factor. We would agree, except for the fact that the statute specifically designates that valuation is to be made on the date of distribution and on no other date.

The government concludes its brief by adding (Gvt. Br. 19) that no one has challenged the validity of the particular regulation involved for some thirty years. What this has to do with the legal rights of the taxpayers in the case at bar is not explained. The fact that no one has challenged the regulation, at least in a reported court decision, does not make it right. We should further point out that the lack of controversy over this regulation may be attributable to more than merely blind acceptance by taxpayers. It could well be that the issue has been undetected by the government's examiners in numerous estates since the regulation was adopted.

Finally, the government attempts to brush off our case (Gvt. Br. 19) on the ground that the regulation worked only a "slight disadvantage" to the Appellants. While the amount in controversy may be small, from the government's point of view, it is not a small item to the Appellants.

CONCLUSION

The decision of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE

It is hereby certified that counsel for Appellants have examined the provisions of Rules 18 and 19 of this Court and are of the opinion that this brief conforms to all requirements.

JOYLE C. DAHL

April, 1966